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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re P.L. et al., Persons Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

J.L.,

Defendant and Appellant.

C059968

(Super. Ct. Nos.
JD224174, JD224175,
JD224176)

J.L., father of minors P.L. and A.L., appeals from the juvenile court's post-permanency review order maintaining an existing no-contact order. He contends there is no substantial evidence that allowing visitation would cause detriment to the minors. We affirm the judgment.

FACTS AND PROCEEDINGS

P.L. (a female, born 2004), A.L. (a male, born 2001), and J.L., Jr. (a male, born 2000), were detained on April 18, 2006. On April 20, 2006, Sacramento County Department of Health and

Human Services (the Department) filed a petition under Welfare and Institutions Code section 300, subdivision (b) (unspecified statutory references that follow are to the Welfare and Institutions Code), alleging that the parents had recent episodes and long histories of domestic violence and substance abuse.

The detention report recommended that the minors be placed in a confidential foster home because the parents admitted recent drug use and the minors confirmed the domestic violence reports. The juvenile court ordered the minors detained on April 21, 2006.

On May 23, 2006, the juvenile court conducted a jurisdiction/disposition hearing (§§ 355, 358). The court sustained the allegations of the section 300 petition, adjudged the minors dependents of the court, directed the Department to place them confidentially, and ordered reunification services and supervised visitation for the parents. The court set a permanency hearing (§ 366.21, subd. (e)) for November 7, 2006, and a permanency review hearing (§ 366.21, subd. (f)) for May 8, 2007.

The permanency report prepared in anticipation of the permanency hearing recommended terminating the parents' reunification services because the parents had not participated in the services and father was at the time incarcerated. The parents' visitation with the minors had been sporadic. The minors were originally placed together, but J.L., Jr., had recently been moved due to inappropriately aggressive and

sexualized behavior. The minors' paternal aunt and paternal grandmother were being considered for placement.

At the permanency hearing which eventually was held on November 27, 2006, the juvenile court terminated the parents' reunification services and set a selection and implementation hearing (§ 366.26) for March 20, 2007 (ultimately continued to July 24, 2007).

The selection and implementation report recommended against immediately terminating parental rights because the minors were not placed in adoptive homes; the Department requested a 90-day continuance to attempt to find such homes. Although difficult to place for adoption, the minors were "specifically adoptable due to their ages, being a sibling group of three[,] and due to their history of temper tantrums, aggressive behavior and sexualized behavior." P.L. had "numerous and extreme temper tantrums"; A.L. had acted out sexually with another male foster child and with P.L.; and J.L., Jr. had been placed in a separate foster home due to aggressive behavior and sexual acting out involving both siblings. The paternal grandmother's home had been approved for placement, but the social worker advised against this.

On May 15, 2007, the juvenile court granted an application to administer psychotropic medication to P.L. The court thereafter repeatedly renewed this order and granted a similar application as to A.L.

An addendum report filed July 23, 2007, requested a further 60-day continuance for home finding as to P.L. and A.L.: due to

their sexualized and aggressive behaviors and P.L.'s extreme tantrums, the Department had not yet been able to find an adoptive home. However, because the paternal grandmother had been able to improve the behavior of J.L., Jr., it was recommended that he be placed with her for purposes of adoption and that parental rights be terminated as to him alone.

At the selection and implementation hearing (§ 366.26) held July 24, 2007, the juvenile court declined to terminate parental rights as to any minor, but authorized temporary placement of J.L., Jr., with the paternal grandmother, ordered further home-study and home finding efforts, and continued the matter to September 25, 2007.

An addendum report filed September 21, 2007, recommended termination of parental rights and a permanent plan of adoption (presumably by the paternal grandmother) as to J.L., Jr., and permanent placement with a goal of adoption as to P.L. and A.L., whose special needs had so far made it impossible to find prospective adoptive homes.

At the continued 366.26 hearing held September 25, 2007, the juvenile court terminated parental rights as to J.L., Jr., and set a six-month post-permanency review hearing as to all the minors on March 11, 2008.

On February 5, 2008, the Department filed a section 388 petition to obtain a no-contact order as to both minors. In support, the Department alleged:

Before father's first scheduled visit on December 6, 2007 (the first time he had requested visitation since November

2006), A.L. expressed fear at the prospect. Although the visit appeared to go well, afterward A.L. asked his foster mother if he could move, saying he was afraid that he would be hurt. On January 4, 2008, A.L. disclosed that father had sexually abused both A.L. and J.L., Jr. Since father's visit, A.L.'s sexual acting out, defiance, aggression, and emotional outbursts had worsened.

The juvenile court immediately suspended visitation by father and set a hearing for February 13, 2008. At the hearing, the court granted the section 388 request pending further order of the court.

The post-permanency review report as to J.L., Jr., stated that the social worker had filed a police report regarding the alleged molestation; because investigation was ongoing, P.L. and A.L. had had no contact with J.L., Jr., since the allegation. J.L., Jr., had not disclosed sexual abuse in an interview, but a further interview was being scheduled.

The post-permanency review report as to P.L. and A.L. recommended a permanent plan of permanent placement with a specific goal of adoption. Home finding efforts were underway, but the recent disclosures of abuse had caused the minors to go through a period of instability. Both minors continued to show disturbed behavior, including prolonged tantrums, aggression, and, in A.L.'s case, sexual acting out. Services had been increased to try to stabilize the minors' behavior and retain their current placement; if those efforts failed, a diagnostic treatment center might be recommended. Father had visited the

minors for one hour, supervised, in December 2007 (the first time in almost a year); the visit reportedly went well, but A.L.'s behavior deteriorated afterward, as previously reported. The Department recommended no change in the existing orders.

At the contested post-permanency review hearing on March 25, 2008, the juvenile court maintained the existing orders as to P.L. and A.L. and set a further post-permanency review hearing for September 9, 2008.

In a progress report dated June 23, 2008, the Department appeared to recommend supervised, once-a-month visitation for the parents with P.L., whose behavior had stabilized. However, at the review hearing on June 24, 2008, the Department's counsel disavowed this recommendation. The Department had substantiated A.L.'s allegations of sexual abuse by father, but law enforcement could not prosecute father at that time. The report said it might be necessary to separate A.L. and P.L. in order to place them permanently.

At the review hearing, the juvenile court maintained all existing orders in effect and set a progress report hearing for July 22, 2008. At that hearing, the court maintained the existing orders.

On July 2, 2008, father filed a section 388 petition requesting visitation as to P.L. The juvenile court set a pretrial hearing on the petition for August 12, 2008, and a contested hearing for August 18, 2008.

The Department and P.L.'s counsel opposed the petition. However, at the August 12, 2008, hearing, the Department's

counsel said: "[T]he social worker has made the determination as stated in her APR [sic] report that she would not be able to make an assessment[] that it would be detrimental for the father to have visits with P[L.]."

The juvenile court held the contested hearing on father's section 388 petition on August 18, 2008.

Social worker Sharon White testified that she had not yet located an adoptive home for P.L., but was currently reviewing five home studies. She had not witnessed visitation between father and P.L., but she believed visitation would be detrimental to the child. P.L. had had many behavioral problems, but was "somewhat stabilized"--her symptoms had decreased and she seemed more bonded with her foster mother. Now that she was on the verge of being matched with an adoptive family, it would confuse her to reintroduce her to biological parents she did not remember while she was being asked to bond to new parents.

Father testified that his visit with P.L. and A.L. in December 2007 went well. He was with them for the first two years and P.L. was "daddy's girl," so he knew she still remembered him. He thought it would be more detrimental to her to try to adapt to a new family than to go back to her father. He was determined to stick with his substance abuse programs, NA meetings, and counseling. He admitted he had not seen P.L. from September 2006 to December 2007.

Father's counsel argued that P.L.'s circumstances had changed for the better because she was now stabilized and doing

well, and the progress report showed visitation could be reopened without jeopardizing that; therefore, changing the court's order would be in her best interest. She did not yet have an adoptive home, and there was no male figure in her life besides her older brother. Even if adoption was the long-term goal, it could not be detrimental for her to know that her biological parents cared about her.

P.L.'s counsel argued that father still seemed to be seeking reunification, even though that was no longer possible. P.L. was not yet completely stabilized despite the Department's substantial efforts. It would be detrimental to her, "on the cusp of being adopted," to have to go through "all that emotional back and forth between learning two families at the same time."

The Department's counsel added that under *In re Manolito L.* (2001) 90 Cal.App.4th 753 (*Manolito L.*), cited by P.L., the standard for a finding of detriment from continued visitation was preponderance of the evidence. Pointing out that P.L. had been out of her parents' custody for over two years, and had seen father only twice in the last two years, counsel argued it would be detrimental to her to make her try to reestablish a bond with him while going through the adoption process.

The juvenile court denied father's petition. The court found it would not be in P.L.'s best interest, as a four-year-old child who had had no visits with father for so long, to resume visitation: it would confuse her and make her adjustment

even harder, and it would also work against the priority for permanency and stability at this stage in the proceedings.

In its post-permanency review report dated August 29, 2008, the Department again recommended permanent placement with a specific goal of adoption. Since the children had stabilized, active home finding efforts were underway, but the Department had not yet located parents "experienced and resourceful enough to manage the children's multiple issues and behaviors." P.L. had shown progress, but still needed close supervision in the foster home; A.L. continued to act out aggressively and disruptively, though he had improved since he began taking prescribed medication in June 2008. Both were in therapy, but A.L.'s therapy had just begun. The Department recommended, as before, that the court find it was unlikely the children would be adopted and it would be detrimental to terminate parental rights as to P.L. and A.L. at the time of the hearing.

At the post-permanency review hearing on September 9, 2008, father objected to the continuing no-contact order. The minors' counsel stated that, from what he knew, the social worker would oppose visitation because the minors had made a lot of progress recently and visitation would be detrimental at this stage.

The juvenile court ruled: "[T]here is a section [of the Department's report] called recommended changes to visitation and the Department is recommending none. They did, although not, you know, with a lot of detail[,] I admit, they did think about it and consider it and are not recommending any changes. On page 18 at the bottom it says the children recently under

went [sic] a period of significant instability and services were put in place. They've stabilized. Active home finding efforts are currently under way. They're about to go to an adoption exchange in 9 or 10 days, so I think it's been considered. The Department's rejected it, thinks that the no-contact order should remain in place. There seems to be a basis for that. I'll go ahead with that. If counsel wants to, you know, challenge that in some way they certainly have the right [to] do that. . . . I think they considered it. I don't think it's fair to say they haven't considered it. Maybe they didn't give it as much consideration as they could have, but it was considered. [¶] I'll adopt the recommended findings on page 20 and 21 and recommended orders. These kids are very close to going toward an adoption and we wouldn't want to do anything to get that off track at this point because services have been terminated."

DISCUSSION

Father contends the juvenile court erred in maintaining the no-contact order because there was insufficient evidence of detriment from visitation.

A. *The Burden of Proof*

The question of the father's right to continue to visit the children arose in the context of a petition for modification brought pursuant to section 388. Father contends that he could not be denied visitation except on the basis of clear and

convincing evidence that visitation would be detrimental to the children.

At the permanency review hearing held on November 27, 2006, the court terminated father's reunification services and set a selection and implementation hearing pursuant to section 366.26. Even so, father had a right to visitation pending the section 366.26 hearing unless the court found that such visitation would be detrimental to the minors. (*In re David D.* (1994) 28 Cal.App.4th 941.) This is true even where the question arises in the procedural posture of a section 388 hearing. (*Manolito L.*, *supra*, 90 Cal.App.4th at pp. 759-760.)

We note that section 366.21, which specifies the procedures to be followed at status review hearings, provides in subdivision (h): "In any case in which the court orders that a hearing pursuant to Section 366.26 shall be held, it shall also order the termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds the visitation would be detrimental to the child."

And section 366.22, which sets out procedures applicable to permanency review hearings, specifies in pertinent part in subdivision (a) that, where the court has ordered a section 366.26 hearing: "The court shall continue to permit the parent . . . to visit the child unless it finds that visitation would be detrimental to the child."

The parties appear to agree that the juvenile court could not deny father visitation with the minors at this stage of the

proceedings except upon a finding that such visitation would be detrimental to the children. We agree also.

The parties part company, however, as to the burden of proof that the court should apply in making this determination; father contending, as noted above, that the burden of proof is clear and convincing evidence and the Department arguing that the proper burden of proof is a preponderance of the evidence.

In *Manolito L.*, we held that detriment to the child from continued visitation must be proven by a preponderance of the evidence. Primarily for the reasons stated in *Manolito L.*, we continue to adhere to that view.

We find some additional support for our holding in *Manolito L.* in the California Supreme Court's decision in *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 (*Cynthia D.*). In *Cynthia D.*, the court held that the termination of parental rights could be based on a standard of proof of preponderance of the evidence, as opposed to clear and convincing evidence, without violating a parent's right to due process of law. In part the court said: "By the time dependency proceedings have reached the stage of a section 366.26 hearing, there have been multiple specific findings of parental unfitness. Except for a temporary period, the grounds for initial removal of the child from parental custody have been established under a clear and convincing standard (see § 361, subd. (b)); in addition, there have been a series of hearings involving ongoing reunification efforts and, at each hearing, there was a statutory presumption that the child should be returned to the custody of the parent.

(§§ 366.21, subds. (e), (f), 366.22 subd. (a).) Only if, over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child is the section 366.26 stage even reached." (*Cynthia D.*, *supra*, 5 Cal.4th at p. 253.)

The *Cynthia D.* court also found that "[a] parent whose conduct has already and on numerous occasions [prior to the section 366.26 hearing] been found to grievously endanger his or her child is no longer in the same position as a parent whose neglect or abuse has not so clearly been established. At this point the interests of the parent and child have diverged, and the child's interest must be given more weight." (*Cynthia D.*, *supra*, 5 Cal.4th at p. 254.)

Although *Cynthia D.* had to do with termination of parental rights and not visitation, the decision is instructive for us nonetheless. It teaches that the interests of the parent shift as the juvenile dependency proceedings go forward and that, by the time of the section 366.26 hearing, parental unfitness has been established on numerous occasions and that the focus of the proceedings is by that time on the best interests of the child. The emphasis on and importance of parental visitation is no longer the same as it is when there are on-going efforts at family reunification. Under those circumstances, the termination of parental rights and, in our view, the termination of visitation can be decided on by a preponderance of the evidence. Put simply, if a parent's parental rights can be terminated at this stage of the proceedings based on proof by a

preponderance of the evidence, a parent's visitation rights can be terminated on that same standard of proof as well.

In support of father's argument that the proper standard of proof for a denial of visitation after the court orders a section 366.26 hearing is proof by clear and convincing evidence, he cites *In re C.C.* (2009) 172 Cal.App.4th 1481. *In re C.C.* gives his argument little or no support.

The Court of Appeal in *In re C.C.* was required, in part, to decide whether an order entered at the disposition hearing (§ 361) denying visitation rights to the mother of the dependent child should be affirmed. Noting that visitation orders are governed by section 362.1, subdivision (a)(1)(A), the court observed that visitation could be denied at that stage of the proceedings only if the court found that visitation would jeopardize the *safety* of the child. "In other words, when reunification services have been ordered and are still being provided . . . some visitation is mandatory unless the court specifically finds any visitation with the parent would pose a threat to the child's *safety*." (*In re C.C.*, *supra*, 172 Cal.App.4th at p. 1491.) The court reversed the trial court's order denying visitation because the court could not determine on the record before it "whether the court's reasoning was properly tethered to the statutory directive mandating parental visitation unless there exists substantial evidence of a threat to the child's *safety*." (*In re C.C.* at p. 1492.)

In re C.C. is of no help to father because, first, although the court made reference here and there to a standard of proof

of clear and convincing evidence, the court was not asked to decide the proper standard of proof regarding a denial of visitation and, thus, any reference to a standard of proof can only be considered dicta. Second, *In re C.C.* dealt with rights of visitation at the beginning of dependency proceedings while the parent is being provided reunification services and, thus, at the point where the emphasis is on family reunification with the attendant importance of visitation. Third, *In re C.C.* dealt with an entirely different portion of the statutory dependency scheme.

Father also appears to rely on *In re Dylan T.* (1998) 65 Cal.App.4th 765. But there, the trial court denied an incarcerated parent visitation rights at the disposition hearing based solely on the young age of the child. Again, the court was not asked to decide the proper standard of proof and the dependency proceedings were in their early stages when there were on-going efforts toward family reunification.

We hold that the juvenile court's decision to deny visitation in this matter properly required proof by a preponderance of the evidence that visitation would be harmful to the minors.

B. *The Court's Order*

We review the juvenile court's discretionary orders under the substantial evidence standard and reverse only if the court abused its discretion by making an arbitrary, capricious, or

patently absurd determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

When the court has terminated reunification services but not parental rights and has selected a permanent plan of long-term foster care, as here, it must hold periodic review hearings to determine what progress is being made toward finding a permanent home for the child. (§ 366.3, subd. (e)(4); *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1145.) After reunification services have been terminated, the child's need for stability and permanency outweighs the parent's interest in continued family ties. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Father asserts that the juvenile court's factual findings did not show evidence of detriment to the minors' physical or emotional health and well-being from visitation. That is not correct. The court found that the minors had grave emotional problems causing major behavioral disturbances and were still far from completely stabilized, but were nevertheless on track for adoption. Because the Legislature prefers adoption as a permanent plan and presumes that it will benefit children's emotional health and well-being, the court could reasonably find, as it impliedly did (and as it had expressly done in denying father's section 388 petition), that any change in the court's orders which might impede progress toward adoption would be detrimental to the minors' emotional health and well-being.

Father asserts that by relying on the Department's findings and recommendations, the juvenile court delegated to the

Department the decision on whether visitation should occur. This point is frivolous. The record plainly shows that the court considered the Department's evidence along with the other evidence before it, and then made its own decision.

Father asserts that there is no "evidence of a nexus between the children's period of instability and visits with appellant, or evidence of a nexus between stability and lack of visits with appellant." However, father cites no authority holding that a finding of detriment from visitation may only be based on a "nexus" between the children's periods of instability and father's visits. In any event, he is factually mistaken: A.L.'s behavior deteriorated sharply after father's December 2007 visit.

Father cites evidence that, as of 2006, the Department thought visitation would be beneficial to the minors. However, father does not explain why that should have mattered in September 2009, when the facts and the Department's opinion were far different.

Father asserts that the Department's home finding activities were immaterial because they had been going on since March 2007. However, he ignores the uncontroverted evidence that the Department had taken specific steps since then which, in its opinion, brought it closer to the goal.

Father asserts that evidence the minors were close to being adopted is immaterial to visitation. On the contrary: as we have explained, when the Legislature's preferred plan of adoption is within reach, anything which might interfere with it

or create needless complications is detrimental to the minors by definition.

Father asserts (inconsistently with the previous point) that the minors were not close to adoption because the juvenile court found, as recommended by the Department, that the minors were unlikely to be adopted. However, this finding does not contradict the court's oral finding that the minors were on track for adoption. Given their special needs, the court could not properly have found that the minors were likely to be adopted so long as a prospective adoptive family had not yet been located. (§ 366.26, subds. (c)(3), (c)(4).) But the court could reasonably credit the Department's representation that it was likely to locate such a family in the relatively near future.

Finally, father asserts: "The Court Failed to Inquire into All Permanency Planning Options as Required by Section 366.3, subdivision (h)." Even assuming that this contention is somehow related to father's main appellate issue, it is forfeited because father fails to show that he raised this objection in the juvenile court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

In short, father has failed to show that the juvenile court abused its discretion by maintaining the existing no-contact order.

DISPOSITION

The judgment (no-contact order) is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ ROBIE _____, J.

_____ BUTZ _____, J.